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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-272

STATE OF GEORGIA, *et al.*,

Petitioners,

v.

THE NATIONAL DEMOCRATIC PARTY,
THE NATIONAL REPUBLICAN PARTY,
et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, the State of Georgia, Lester G. Maddox, individually and as (former) Governor of the State of Georgia (now Lieutenant Governor), the State Election Board of Georgia, Ben W. Fortson, Jr., individually and as Secretary of State of the State of Georgia and as Chairman of the State Election Board, Mrs. Harry B. Williams, W. F. Blanks and John W. Greer, individually and as members (and former members) of the State

Election Board, and Ralph A. Dougherty and Harold N. Hill, individually, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on July 23, 1971.

Petitioners name as respondents the National Democratic Party, the Democratic National Committee, Channing E. Phillips and Miss Flaxie Pinkett, individually and as District of Columbia members of the Democratic National Committee, the National Republican Party, the Republican National Committee, and Carl L. Shipley and Mrs. J. Willard Marriott, individually and as District of Columbia members of the Republican National Committee.

OPINIONS BELOW

The opinions of the Court of Appeals and the District Court, not yet reported, appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on July 23, 1971, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May the Democratic and Republican Parties weight the votes of citizens in favored States, and dilute the votes of citizens in disfavored States, in nominating the President of the United States?

2. May the Democratic and Republican Parties nominate the President in malapportioned national conventions, or should such conventions be reapportioned pursuant to the 14th Amendment on the basis of one man-one vote?

3. Was the court below correct in holding that one man-one vote is not the proper apportionment formula to be utilized by respondents in nominating the President of the United States?

4. Where a Court of Appeals finds state action in a non-political, justiciable question, may the appellate court deny declaratory and injunctive relief because of the emphasis appellants placed on the errors of the District Court rather than on the form of relief (App. 18)?

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fourteenth Amendment, Section 2, particularly:

> "But when the right to vote at any election for the choice of electors for President and Vice President of the United States . . . is . . . in any way abridged, except for participation in rebellion, or

other crime, the basis of representation therein [in the House of Representatives] shall be reduced . . . ."

STATEMENT OF THE CASE

This is a voting rights case, brought on behalf of voters whose vote in presidential elections is being diluted and debased by the malapportioned national nominating conventions conducted by respondents. The suit, invoking the jurisdiction of the District Court on the above stated basis (28 U.S.C. §§ 1343(3), 1343(4), 2201, and 42 U.S.C. §§ 1983, 1985(2), 1985(3) and 1988), sought a declaratory judgment that respondents' national conventions are malapportioned and violate plaintiffs' constitutional and civil rights. Complainants also sought injunctive relief.

The use of nominating conventions to choose candidates for the presidency began in 1832 in the Democratic Party. The Republican Party met in its first national convention in 1856.

There exists today, with respect to presidential elections, a two party system, which system has existed since at least 1868. The two political parties are respondents in this action. Every four years the respondents meet in convention to elect nominees for the offices of President and Vice President.

No person not a nominee of one or the other of these two political parties has been elected President or Vice President in the last 100 years.

Nomination of one's candidates at one of respondents' national conventions is the only means available to succeed in electing such candidates to office. Failure to

become the nominee for the office of President or Vice President of one or the other of the two political parties is equivalent to defeat.

Voters throughout the United States are effectively limited in their choice of President and Vice President to the nominees of one or the other of these two political parties. The national conventions are an integral part of the presidential election process.

The nominees of the two political parties are chosen in malapportioned national conventions. The apportionment formulas of both political parties for their 1968 conventions are reproduced in the appendix (App. 19, 20). Suffice it to say that both political parties awarded "victory bonus" votes to States which favored the party's presidential candidate, and "popular bonus" votes based on the number of votes cast for the party's candidate, in the preceding presidential election.

At the 1968 Democratic Convention, the citizens of 29 States were overrepresented, and those of 20 were underrepresented. Only Arizona was neither over nor underrepresented.

At the 1968 Republican Convention, the citizens of 34 States were overrepresented, and those of 15 were underrepresented. Only West Virginia was neither over nor underrepresented.

However, by and large it was the citizens of those States who were overrepresented in the Democratic Convention who were also overrepresented in the Republican Convention. Similarly, the citizens underrepresented in the Democratic Convention found themselves underrepresented in the Republican Convention. (Appellants will be underrepresented in both conventions in 1972.)

Twenty-eight States were overrepresented at both 1968 national conventions (Alaska, Arkansas, Colorado, Delaware, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming). Fourteen States were underrepresented at both 1968 national conventions (California, Florida, Illinois, Indiana, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Texas and Virginia).

The ratio of most overrepresented State to least represented was in excess of to 9 to 1 in both conventions. The people in the State of Alaska were overrepresented in both national conventions held in 1968 by a variance of approximately 85% (Demo.—84.97%; Repub.—85.99%).

Delegates representing about 38% of the people had a majority and controlled the nomination of candidates in *both* conventions (Demo.—38.27%; Repub.—37.39%).

Of the 28 States which were overrepresented at both 1968 national conventions, 19 were west of the Mississippi River. Of the 14 States which were underrepresented at both National Conventions in 1968, 12 were east of the Mississippi.

The respondents' apportionment formulas which produced this disproportionate "State-unit" system favoring the western States were found by the District Court to be "responsive and reasonable under the prevailing cir-

cumstances", and "non-justiciable" (App. 1-2). That court denied petitioners' prayers for injunction as well as for summary, declaratory, judgment (App. 2).

The Court of Appeals found "state action", noting that it is as if the States themselves were collectively conducting the nominating conventions (App. 11). The court found a non-political, justiciable question (App. 12-15). Yet the court did not declare whether or not respondents' national conventions are malapportioned, and did not determine whether respondents' apportionment schemes are fair and reasonable. Instead, the court held that one man-one vote is not the appropriate standard for respondents (App. 16-18) and affirmed the judgment of the District Court, denying all relief, including declaratory relief, to appellants (App. 19).

We respectfully submit that having found state action (just as if the States collectively conducted the conventions), and having found a non-political, justiciable question, then "one man-one vote" follows as the day follows night. We submit that the respondents are not entitled to special treatment under the Constitution, not accorded to the States themselves. And we most respectfully submit that if there is to be any limitation on "one man-one vote," it can only be valid and effective nationwide, as to Democrats and Republicans, if announced by this Court.

REASONS FOR GRANTING THE WRIT

As of now, every voter in the United States is either underrepresented or overrepresented in one or both of the national conventions which predetermine the voters'

choice of President. Many voters are overrepresented in both conventions, many are underrepresented in both. Georgians are among those that will be underrepresented at both 1972 conventions.

The decision in this case, even denial of this petition, will affect every voter in the United States. The decision will either permit the continuation of massive vote dilution in presidental elections, or it will make the political parties responsive to the people, rather than making the people respond to the candidates chosen by the political parties.

The presidential candidates will be affected by this decision. They will either continue to campaign among the trees and pastures or they will go to where the people are.

This Court, in its reapportionment decisions and its voting rights cases, has applied the one man-one vote principle consistently, from the lowest level of elective public office. The courts below refused to apply this Court's decisions to the highest, most important office—the presidency.

The District Court for the District of Columbia, a court singled out to decide voting rights cases (Voting Rights Act of 1965, Pub.L. 89-110, Aug. 6, 1965, 79 Stat. 439, 42 U.S.C.A. § 1973c), cited only one decision of this Court. That was *Powell v. McCormack,* 395 U.S. 486 (1969).

Citing *Powell,* the District Court said (App. 2):

> "This Court finds that the claim in this action does not admit to judicial relief as there are no 'judicially

discoverable and manageable standards' by which to frame appropriate relief."

We in Georgia, personally familiar with the landmarks of *Gray v. Sanders,* 372 U.S. 368, and *Wesberry v. Sanders,* 376 U.S. 1, and well acquainted with *Baker v. Carr,* 369 U.S. 186, and *Reynolds v. Sims,* 377 U.S. 533, have found one man-one vote to be discoverable, judicially, and manageable. We were surprised that the courts below did not manage those decisions, or the remainder of *Powell v. McCormack,* which went on to hold that where declaratory judgment is sought (as it was in the instant case), it should be granted even if coercive (injunctive) relief were found to be inappropriate.[1] As in *Powell,* the petitioners here sought a declaratory judgment, a form of relief the courts below could and should have issued. *Powell v. McCormack, supra* at 517.

In *Powell,* this Court relied upon the first of its re-

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[1]The District Court for the Western District of Washington, in *Maxey v. Washington State Democratic Committee,* 319 F. Supp. 673 (W.D. Wash. 1970), *appeal pending* (No. 71-1051, 9th Cir.), a case preserved by this Court's decision in *Dahl v. Republican State Committee,* 393 U.S. 408 (1969), held that *state* conventions were subject to those decisions of this Court, and that the proper apportionment formula was either "one Democrat-one vote" or "one man-one vote".

The District Court for the District of Columbia, in *Bode et al. v. National Democratic Party et al.* (D.C. No. 540-71), *appeal pending* (No. 71-1536, D.C. Cir.), held on June 22, 1971 that *national* conventions were subject to the decisions of this Court, held that the apportionment of delegates to those conventions is justiciable, held the 1972 Democratic delegate apportionment formula to be invalid, but ordered reapportionment on the basis of "one Democrat-one vote", not "one man-one vote". The Republicans are not parties to that suit.

apportionment decisions, *Baker v. Carr*, 369 U.S. 186 (1962), saying (*Powell v. McCormack, supra* at 517):

> "In deciding generally whether a claim is justiciable, a court must determine whether 'the *duty* asserted can be judicially *identified* and its *breach* judicially *determined*, and whether *protection* for the right asserted can be judicially *molded*.' *Baker v. Carr, supra*, at 198." (Italics added.)

As for the case at bar, the duty asserted has been judicially identified—one man-one vote. The breach has been judicially determined—malapportionment violates the equal protection clause. And the remedy has been judicially molded—reapportionment on the basis of one man-one vote.

The District Court nevertheless denied even declaratory relief, and the Court of Appeals affirmed.

This suit was filed on March 25, 1970, in ample time to have it decided before the 1972 presidential election process begins.

Petitioners expedited the proceedings (filing interrogatories and requests for admissions, so as to avoid issues of fact, while respondents postponed answering), and secured a hearing in the District Court on November 6, 1970.

The District Court issued its decision on November 24, 1970 (App. 1-2). Petitioners promptly filed their notice of appeal, docketed the case in the Court of Appeals on January 7, 1971, and moved that it be advanced for oral argument because of the importance of the issues raised and the need for expedition.

On February 19, 1971, respondent Democratic National Committee adopted its 1972 apportionment formula, and it was considered by the Court of Appeals. (The apportionment formulas of the Democrats and Republicans for use at their 1972 conventions are reproduced in the appendix, App. 22, 24.)

The Court of Appeals granted petitioners' motion for expedition, and oral argument was heard on April 9, 1971. Its decision was rendered on July 23, 1971 (App. 3). Summer and its judicial recesses are now here.

The 1972 presidential election process will commence on or about January 7, 1972, with the opening of qualifying for presidential candidates, and for candidates seeking election as delegates to the 1972 national conventions, in the New Hampshire Presidential Primary to be held on March 14, 1972.

Under the present Democratic apportionment formula, New Hampshire will have 18 delegates at the 1972 Democratic Convention. According to its population, New Hampshire is entitled to only 11 votes at that convention. It will be overrepresented by 7 votes, or 63.33%.

If New Hampshire opens qualifying for 18 delegates on January 7, 1972, and then has to cut its delegation to 11, before or after its March Presidential Primary, 7 delegates and many New Hampshire voters, not to mention the presidential candidates, will be directly affected. The same is true of other States holding such primaries; e.g. Massachusetts (delegate qualifying closes February 16, 1972 for the April 25 primary), Ohio (delegate qualifying closes March 1 for the May 1 primary), Wisconsin (delegate qualifiying closes March 14, 1972

for the April 4 primary), Nebraska (delegate qualifying closes March 10, 1972 for the May 9 primary), Florida, Oregon, New Jersey, *et al.*[1]

Under the present Democratic apportionment formula, Massachusetts will be overrepresented by 18 votes, Ohio is underrepresented by 5 votes, Wisconsin is over by 1 vote, Nebraska is over by 2 votes, Florida is under by 20 votes, Oregon is over by 3 votes, and New Jersey is over by 3 votes. (Georgians will be underrepresented at the 1972 Democratic Convention by 15 votes.)

Those delegations having to increase their number in either the Democratic or Republican Convention may experience more difficulty than those having to cut.

However, there is no need for doubt as to the number of delegates (votes) the citizens of each State shall have at the '72 conventions, if certiorari is granted.

The Court of Appeals for the District of Columbia held that a delegate to a national convention represents only those citizens of his State who share his political persuasion (App. 17). We submit that under the present system, the citizens of his State are forced to adopt his political persuasion, or that of his counterpart in the other convention. The court below stated that a delegate may vote for a candidate whose views are diametrically opposed to the political persuasion of large segments of the population of his State (App. 17). We readily admit that this is historically true, but it is this view of the delegate's role in selecting the President which appellants seek to have reviewed. Should the

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[1]In 1968, fourteen states held presidential primaries. The number is expected to increase in 1972.

delegates be responsive to all citizens, rather than to a few? And if the proper standard is "one Democrat-one vote" and the definition of a Democrat is "one who voted for the Democratic nominee in a past election or elections", what voice in the selection of the President in 1972 will the 25 million people have, who have attained voting age and rights since the last presidential election (U.S. News and World Report, June 14, 1971, p. 38; see *Oregon v. Mitchell*, 400 U.S. 112)? We earnestly submit that these issues warrant resolution by this Court.

Petitioners thus seek the expeditious grant of certiorari so as not to disrupt the 1972 presidential election process, by allowing time for consideration and rendition of a proper and final decision in this case affecting all voters and both political parties.

CONCLUSION

We respectfully submit that the issues in this case are of such imperative public importance as to necessitate prompt settlement in this Court and that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NO. 882-70

THE STATE OF GEORGIA, ET AL., PLAINTIFFS

v.

THE NATIONAL DEMOCRATIC PARTY, ET AL.,

DEFENDANTS

Decided November 24, 1970

MEMORANDUM AND ORDER

Plaintiffs in this action are seeking injunctive relief and a declaration by this Court that the Fourteenth Amendment requires that delegates to the national conventions of the Republican and Democratic political parties be allocated among the various states strictly on the basis of population.

A political party is in its essence based upon the constitutional rights of citizens embraced in the freedoms of assembly, speech and press which assure that citizens be free to organize themselves to engage in political discussion and activity. See, 29 C.J.S. Elections § 84, Political Parties. While it is recognized that, when necessary to prevent unreasonable abuses, courts are competent to evolve new doctrines in the realm of the "internal affairs" of voluntary associations, it appears that the procedures adopted by the defendant political parties and

attacked herein are responsive and reasonable under the prevailing circumstances. The allocation formulae adopted by the Republican and Democratic national conventions are employed to further their legitimate purposes and are neither arbitrary, capricious nor violative of any right guaranteed under the Fourteenth Amendment.

In *Powell v. McCormack*, 295 U.S. 486 (1969), the Court stated that justiciability encompasses two important considerations: first, the courts must determine whether the issue constitutes a political question and second, the courts must find that the claim presented and the relief sought admit of judicial relief. This Court finds that the claim in this action does not admit to judicial relief as there are no "judicially discoverable and manageable standards" by which to frame appropriate relief. *Maxey et al v. Washington State Democratic Committee, et al.* (No. 7838, D.C.W.D.Wash., October 26, 1970), cited by plaintiffs, turned, in material respects, on a statutory commitment of the State of Washington to the popular election of delegates to the national conventions. No such state statute is involved in the present case.

Accordingly, it is by the Court this 24th day of November 1970

ORDERED that plaintiffs' motion for preliminary injunction and summary judgment be and it is hereby denied, and it is further

ORDERED that defendant Carl L. Shipley's motion for summary judgement is treated as a motion to dismiss and it is hereby granted, and it is further

ORDERED that the motion of defendants National

Democratic Party, National Democratic Committee, Channing E. Phillips and Miss Flaxie Pinkett to dismiss be and it is hereby granted, and it is further

ORDERED that the motion of defendants Republican National Committee and Mrs. J. Willard Marriott to dismiss be and it is hereby granted, and it is further

ORDERED that the motion of defendant National Republican Party to quash services of process be and it is hereby granted.

/s/ JOHN LEWIS SMITH, JR.

United States District Judge

UNITED STATES COURT OF APPEALS

NO. 71-1018

THE STATE OF GEORGIA, ET AL., APPELLANTS

v.

THE NATIONAL DEMOCRATIC PARTY, ET AL.

Appeal from the United States District Court for the District of Columbia

Decided July 23, 1971

Before McGOWAN, TAMM and ROBB, *Circuit Judges.*

PER CURIAM: Appellants here urge that the constitutional principles enunciated in the Supreme Court's reapportionment cases, beginning with *Baker v. Carr*, 369 U.S. 186 (1962) and extending through the cases decided during the October, 1970 Term,[1] should be pro-

[1]Abate v. Mundt, 39 U.S.L.W. 4663 (June 7, 1971); Whitcomb v. Chavis, 39 U.S.L.W. 4666 (June 7, 1971); Gordon v. Lance, 39 U.S.L.W. 4719 (June 7, 1971).

jected by this court into the arena of national party politics. It is argued that the Court's precedents over the last decade compel the conclusion that the delegate-allocation formulas, utilized by both of the major national political parties to determine the quantum of representation of the various state parties at the 1972 Republican and Democratic National Conventions, are incompatible with the Equal Protection Clause of the Fourteenth Amendment. Thus it is said that the Republican and Democratic Conventions must be reapportioned so that each delegate will represent a segment of the national population as nearly equal as is mathematically possible.

Such contentions raise, first, difficult preliminary issues of state action and justiciability bearing upon our power to adjudicate the merits of the complaint; and, second, questions respecting the range of legitimate considerations open to political parties in determining the make-up of their conventions to select Presidential and Vice Presidential nominees. Resolution of the case before us is possible, however, short of definitive identification and prescription of such considerations. The several reasons for our disposition of the single claim presently pressed upon us are set out hereinafter.

I

Appellants include the State of Georgia, its Secretary of State, and State Election Board, as well as individual Georgia residents claiming to represent all similarly situated registered voters in that State. Appellees are the National Democratic Party, the Democratic National Committee, the Democratic committeeman and committeewoman for the District of Columbia, and the counter-

parts of these entities and individuals on the Republican side.[2]

On March 25, 1970, appellants filed a complaint in the District Court seeking declaratory and injunctive relief on the ground that the National Conventions of both parties are "malapportioned," and that only a delegate-allocation formula premised solely on population differences between the states could be squared with the Fourteenth Amendment. The case was heard on cross-motions for summary judgment and motions to dismiss filed by several of the appellees. By Memorandum and Order dated November 24, 1970, the District Court ruled in appellees' favor, holding both that the issue raised was nonjusticiable and that, on the merits, the allocation formulas did not work invidious discriminations contravening applicable constitutional standards. On appeal to this court, in view of the obvious necessity to resolve, as far as possible, the challenge of the complaint in advance of

[2]One of the subsidiary issues in this case is whether the National Republican Party was properly named and served as a defendant in the District Court. Other Republican defendants below filed a motion to quash service of process or to dismiss the complaint against the "Party" on two grounds. First, they contend that there simply is no unincorporated association known as the National Republican Party. According to their representations, the Republican aggregate is composed only of *State* Republican Parties, which act in concert during the Convention to conduct national party business. Between the quadrennial conventions the national affairs of the Republican National Convention are handled by the Republican National Committee. Appellants, however, introduced substantial evidence to the contrary in the form of the Party's rules and by-laws, membership solicitation forms taken from the Party's magazine, a 1969 Party Membership Card, and, among other items, a cancelled check made payable to the Republican Party. We find such evidence persuasive.

Second, the Republican appellees contend that, if the Party did exist, service upon it was nonetheless improper. Rule 4(d)(3) of

delegate selections at the state level in preparation for the impending 1972 Conventions, we established an expedited briefing and hearing schedule for the case.

Prior to oral argument, the plaintiffs in another action then currently being filed in the District Court, *Bode, et al. v. National Democratic Party, et al.*, No. 540-71, filed a motion to intervene or in the alternative to participate as *amici curiae*. Although the motion to intervene at this stage was denied, in view of the similarity of several issues raised in both cases we granted the request to participate as *amici curiae* to the extent of filing a brief. While *Bode*, like this case, represents a challenge to an existing delegate-apportionment formula, it differs in at least two important respects. First, the suit by the *Bode* plaintiffs, who are Democratic Party members in California, New York, Connecticut, and the District of Columbia, attacks only the constitution of their own Party's Convention. Second, the allocation principle urged by the *Bode* plaintiffs—characterized throughout as "one Democrat, one vote"—is substantially different from appellants' formula founded solely upon population.

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the Federal Rules of Civil Procedure states that service upon an unincorporated association may be made by "delivering a copy of the summons and of the complaint to an officer, or a managing or general agent" of the association. Service was made here on an employee of the National Committee at its Washington, D. C. office; and, while the Committee protests that the employee was not one of its own "officers" or "managing or general agents," it does not challenge the sufficiency of service on itself. Nor do we understand the Committee to argue that, if there is a National Party, the Committee is not its managing or general agent. Based upon these two concessions we find both that service on the Party was properly effected by the unquestioned service on the National Committee in its agency capacity, and that the trial court erred in granting the motion to dismiss. In view of the disposition we make in this case, error in this respect does not necessitate reversal.

While the *State of Georgia* case was under submission in this court, plaintiffs in *Bode* obtained a favorable ruling in the District Court on June 22, 1971. An appeal from that decision has now been docketed by the Democratic Party defendants, and that appeal is also receiving expedited handling in this court. That case is not before us at the present time and we, of course, express no view as to its merits.

II

We are confronted at the outset with the task of deciding whether "state action" within the intendment of the Fourteenth Amendment can be found in the delegate-allocation determinations challenged here. Such a finding is a necessary prerequisite to invoking the Equal Protection Clause. While this limiting concept has been defined with increasing liberality in recent years,[3] the issue is not without difficulty where, as here, the activity allegedly violative of the Constitution has been historically viewed as a purely private political matter.

Initially, it may be helpful to place clearly in context the level at which state action must be found in this case. We are not concerned here with the question of *how* convention delegates are chosen by the various states. Our problem is one step removed. It is: On what basis may the national political parties determine *how many* delegates are to be allotted to each state political party?

In the Republican Party the delegates to the 1968 Convention participated directly in the decision establishing

[3] *See, e.g.*, Black, *The Supreme Court—Foreword*, 81 HARV. L. REV. 69, 95-100 (1967); Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963).

the allocation formula to be applied for the 1972 Convention. The plan was submitted to, and approved by, the Convention delegates during the Convention. In the Democratic Party, on the other hand, the responsibility was delegated to the Party's National Committee. A special Rules Commission—known as the "O'Hara Commission"—was established at the 1968 Convention and directed to study the methods and criteria used by the Democratic Party in allocating delegates to the states and to suggest reforms. Upon the completion of its study a report was submitted to the National Committee. That body, after considering the Commission report as well as the recommendations of its own Executive Committee, announced the formula to be employed in 1972.[4]

With this brief sketch of the Parties' procedural methods for creating their apportionment formulas in mind, the thrust of appellants' primary line of reasoning on the state action question becomes apparent. The three-step analysis is developed in the following manner. First, it is argued, the Supreme Court has consistently found state action in the activities of state political parties insofar as those activities touch upon the machinery whereby *candidates* are nominated by the parties to seek election to local or national office. This is the clear force of the *Texas White Primary Cases*;[5] and, as those cases and others demonstrate, it makes no difference for pur-

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[4]Both allocation schemes give weight to such factors as each State's Electoral College strength, which is partially a function of population, and to prior performance, *i.e.*, the extent to which any State Party has provided support for the Party's candidates in the general elections of the recent past. Consideration of the details of these apportionment formulas is not necessary in resolving this preliminary issue.

[5]Nixon v. Condon, 286 U.S. 73 (1932); Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953).

poses of finding state action that the state party acts through a statewide party primary, a state party convention, or a state party committee.[6]

Second, logic dictates that a state party's action in selecting *delegates* to its national convention is also invested with state action since the delegates' primary function is the nomination of candidates for the nation's highest offices. While the few courts that have passed on the precise question—whether the state's *delegate*-selection processes are imbued with the same quality of state action found in *candidate*-nomination processes—are divided,[7] we find ourselves in substantial agreement with the conclusion of the District Court in *Maxey v. Washington State Democratic Comm., supra* note 7, 319 F.Supp. at 678, that the analogy to the *candidate*-nomination cases is a close and compelling one.

Finally, if the action of the individual state parties in selecting delegates to participate in the presidential-nom-

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[6] *See, e.g.,* United States v. Classic, 313 U.S. 299 (1941) (party primary); Gray v. Sanders, 372 U.S. 368, 374-75 (1963) (party primary); Smith v. Allwright, 321 U.S. 649 (1944) (state convention); Nixon v. Condon, 286 U.S. 73 (1932) (state committee).

[7] *Compare* Maxey v. Washington State Democratic Comm., 319 F.Supp. 673 (W.D. Wash. 1970), *appeal docketed,* No. 71-1051 (9th Cir., Jan. 12, 1971) (state action found), *with* Irish v. Democratic-Farmer-Labor Party, 287 F.Supp. 794, 802-03 (D. Minn.) (state action discussed but resolution found unnecessary), *aff'd,* 399 F.2d 119 (8th Cir. 1968), *and* Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965) (no state action in party's *internal* affairs; candidate-nomination question left open), *and* Smith v. State Exec. Comm., 288 F.Supp. 371, 374 (N.D. Ga. 1968) (no state action found). *See generally* Note, *One Man, One Vote and Selection of Delegates to National Nominating Conventions,* 371 U. CHI. L. REV. 536, 538-45 (1970); Note, *Constitutional Safeguards in the Selection of Delegates to Presidential Nominating Conventions,* 78 YALE L.J. 1228, 1232-35 (1969).

inating process constitutes state action, the collective activity of all the states' delegates at the national convention can be no less readily classified as state action. Since the promulgation of each party's delegate-allocation formula for the next national convention is, as we have indicated, either the direct collective act of the state parties (Republican procedure) or is the responsibility of a body designated by the state parties (Democratic procedure), the precise national party decisions challenged in this case were, in reality, the decisions of the states acting in concert. Those acts are, therefore, not immune from constitutional scrutiny.[8]

Supreme Court cases also suggest a second, related but more generalized, basis for finding state action. The states are responsible for conducting the general elections which determine both the selection of State Electors and, with rare exceptions, how they will vote in the Electoral College. U.S. Const. art. I, § 2; amend. XII. As is the case with regard to the election of members of Congress, the major parties' nomination procedures play such an important role in the presidential selection process that they can fairly be said to be "integrally related" to the subsequent general elections.[9] The electorate's choice in the general election is effectively restricted to the nominees of the two parties. By placing the nominees' names on the ballot, the states, in effect, have adopted this narrowing process as a necessary adjunct of their election procedures. Therefore, every step in the nominating process—especially the crucial determina-

[8] For a discussion of this state action rationale see, Note, *Regulation of Political Parties: Vote Dilution in the Presidential Nomination Procedure*, 54 IOWA L. REV. 471, 476-77 (1968).

[9] *See, e.g.*, United States v. Classic, 313 U.S. 299, 314 (1941); Terry v. Adams, 345 U.S. 461, 469 (1953); Gray v. Sanders, 372 U.S. 368, 380 (1963).

tion of how many delegate votes each state party is to be allotted—is as much a product of state action as if the states themselves were collectively to conduct such preliminary conventions.[10]

The Supreme Court decisions on which this theory relies, finding state action in the conduct of state primaries because of the integral relationship between primary and general elections (*see* note 9 *supra*), arose in one-party states where nomination was indeed tantamount to election. We are unable to perceive, however, how that difference alone can be said to dilute the pertinency of those cases to the situation we now confront. National Convention nominating procedures effectively restrict the electorate to two choices rather than one. Mr. Justice Pitney's commentary on the realities of the American political process in his frequently quoted concurrence in *Newberry v. United States*, 256 U.S. 232, 285-86 (1921), has lost none of its relevancy over the last half decade:

> "[I]t seems to me too clear for discussion that primary elections and the nominating conventions are . . . closely related to the final elections . . . . So strong with the great majority of voters are party associations, so potent the party slogan, so effective the party organization, that the likelihood of a candidate succeeding in an election without a party nomination is practically negligible. As a result, every voter comes to the polls on the day of the general election confined in his choice to those few candidates who have received party nominations . . . . As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made."

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[10]The "integral relation" rationale is discussed in Note, 37 U. CHI. L. REV. at 542-44, *supra*, note 7.

The state action question is not an easy one in view of the widespread assumption that party delegate-allocation decisions are matters entirely within the private domain. Nonetheless, in the absence of further explication by the Supreme Court on this point, we incline to the conclusion that the National Conventions are not so divorced from the activities of the states in conducting presidential elections as to negate the existence of state action.

III

Of course, state action is not in itself a sufficient basis on which to premise the grant of affirmative relief sought by appellants. We must stay our hand, as did the District Court, unless we are able to conclude that the issues raised, in addition to satisfying state action requirements, are justiciable. Justiciability, in the context of this case, raises the troublesome question whether judicial scrutiny of the National Democratic and Republican Parties' internal decisionmaking processes—processes through which delegate seats to their respective Conventions are apportioned among the state parties—requires the courts to "enter upon policy determinations for which judicially manageable standards are lacking." *Baker v. Carr*, 369 U.S. 186, 226 (1962).[11]

Appellees urge that no such standards exist. They claim that judicial intervention in this sensitive area would not only bar the national parties from balancing what they consider to be the multiple legitimate factors in formulating an appropriate delegate-allocation scheme, but would also place them in a strait jacket regarding

[11]We deal here only with the standards aspect of the justiciability doctrine since we apprehend no serious questions with respect to the political question-separation of powers elements. *See* Powell v. McCormack, 395 U.S. 486, 518-49 (1969).

party representation—a consequence which would be severely inimical to their future vitality. These fears, as we understand them, read too much into the justiciability doctrine. Appellees appear to treat as one and the same the finding that judicially manageable standards do exist, on the one hand, and the conclusion, on the other, that mathematical equality is the sole permissible criterion in distributing Convention seats among the states. Such is neither the clear teaching of *Baker v. Carr* nor the consequence of applying the Equal Protection Clause as developed in the other reapportionment cases.

Baker v. Carr, on this score, held only that

> "[j]udicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to the courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, *that a discrimination reflects no policy, but simply arbitrary and capricious action.*"

Id. at 226 (emphasis supplied). The persistent theme that runs throughout the Supreme Court's pronouncements is that justiciability is not to be equated with invalidation. It is, rather, the absence of constitutionally permissible justifications for deviations from precise equality that renders apportionment formulas arbitrary and capricious, and thus offensive to the Fourteenth Amendment. It is the lack of a rational basis for drawing distinctions between groups of citizens which leads to judicial imputation of the one man, one vote requirement.[12]

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[12]*See e.g.,* Avery v. Midland County, 390 U.S. 474, 484 (1968) ("The Equal Protection Clause does not, of course, require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious."); Burns v. Richardson, 384 U.S. 73 (1966); Gordon v. Lance, 39 U.S.L.W. 4719 (June 7, 1971).

In *Gray v. Sanders*, 372 U.S. 368 (1963), for instance, it was the absence of any valid relationship between the unit system as employed in the Electoral College and the similar utilization of a unit system in county primaries which compelled the conclusion that the resulting discrimination could only be arbitrary and invidious. Similarly, in *Reynolds v. Sims*, 377 U.S. 533, 571-77 (1964), the Court found that in developing standards for state legislative apportionment the analogy to federal Congressional apportionment was inapposite. The Court there further concluded that the two alternate schemes proposed to the three-judge District Court by the Alabama Legislature were "completely lacking in rationality." *Id.* at 568.

The lesson of these cases was restated in *Swann v. Adams*, 385 U.S. 440, 444 (1967). It was there again held that deviations from equality of voting power may be permissible, but only if they reflect legitimate considerations incident to the effectuation of some rational policy. This principle was most recently applied in *Abate v. Mundt*, 39 U.S.L.W. 4663 (June 7, 1971), where a deviation, from the mathematical norm, of twelve percent in the plan for election of county supervisors was approved. The plan found its legitimation in the locality's interest in preserving the integrity of its political subdivisions and in the need for "close cooperation between the county and its constituent towns." *Id.* at 4665.

The principle which renders the questions raised in this litigation justiciable is that courts are competent to scrutinize the allocation schemes promulgated by the national parties in order to determine whether, given the context of political partisanship out of which such formulas necessarily arise, substantial deviations from equality of

voting power at the Conventions are supported by legitimate justifications.[13] We do not underestimate the difficulty of the task. Neither do we think, however, that in light of conventional Fourteenth Amendment analysis, coupled with a full awareness of the important roles played by voluntary political parties in our system of self-government, the courts will be left to face that task in a standardless vacuum.

IV

Appellants contend that the crucial starting point for this court in its evaluation of the apportionment schemes is to determine whether those schemes are compatible with a population-based one man, one vote test. More precisely, appellants postulate that, insofar as practicable, each delegate to his party's National Convention must be representative of an equal segment of the national population and that any deviation *from that test* must be fully justified.

For example, according to their theory, since the States of Arizona and West Virginia are of approximately equal population,[14] they must be allowed to send equal numbers of voting delegates to the National Conventions. Under appellants' formula each of those two States would send

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[13]Consistent with the courts' long tradition of vigilance in "scrutinizing schemes allegedly conceived or operated as purposeful devices to further racial discrimination," any delegate-allocation formula found to constitute invidious discrimination in terms of such factors as race, religion, sex, or economic status would be subject to judicial invalidation. *See e.g.,* Whitcomb v. Chavis, 39 U.S.L.W. 4666, 4673 (June 7, 1971).

[14]According to 1970 Census figures submitted by appellants, Arizona has a population of 1,772,482 and West Virginia has 1,744,237.

26 delegates to the National Democratic Convention. Each State would also send an undetermined but equal number of delegates to the Republican Convention. Every state would, therefore, have proportionally the same delegate strength at each Party's Convention. Long-standing local disparities in party strength would no longer be relevant in determining a state party's voice in its national party.

Appellants' thesis is unacceptable. Even assuming a complete absence of recognizable justifications in the parties' present allocation formulas for deviations from a rule of *equal representation*—an assumption we make only for purposes of the instant discussion and without intimating any view whatsoever as to whether such justifications have or have not been shown—the imposition of a population-based criterion would constitute a departure from the *equal representation* standard underlying the reapportionment cases. While population may be an appropriate measuring rod when public officials are to be elected and held responsible to the entire citizenry,[15] population alone is an inappropriate test of representation in the framework of national politics where parties compete for membership. Although both major parties are constantly striving to garner a greater share of the voting population's support, neither has yet been so successful as to permit it to claim representation of the entire population. The constituency of each party is significantly smaller than the whole of the eligible electorate, and varies dramatically from state to state and from

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[15] *See, e.g.*, Burns v. Richardson, 384 U.S. 73 (1966); Calderon v. City of Los Angeles, 481 P.2d 489, 93 Cal. Rptr. 361 (Sup. Ct. 1971).

election to election. For this reason it has never heretofore been thought that (with rare exceptions in one-party states) any delegate to a National Convention could fairly claim to speak for *all* the voters from his jurisdiction. Quite to the contrary, his constituency, if he may be said to represent a constituency,[16] is composed only of the voters within his state who are of like political persuasion. Indeed, responsible representation may require that a delegate vote for a candidate as his party's nominee whose views are diametrically opposed to the political persuasion of large segments of the population within the delegate's home state.

The fallacy in appellants' position lies in their misplaced reliance on cases in which local, state, or national officials were elected to perform governmental functions on behalf of the entire electorate in a particular locale.[17] In the political party context, however, the primary function performed by a delegate to a National Convention is to participate in a process leading to the designation of a candidate for national office—a prerogative he exercises on behalf of only a portion of the total local population. Appellants' argument is reminiscent of Mr.

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[16]*See* Reynolds v. Sims, 377 U.S. 533, 563 (1964) (legislative districting scheme which "gives the same number of representatives to unequal numbers of *constituents*" offends standards of Equal Protection) (emphasis supplied).

[17]It would seem that Mr. Justice Black's *caveat* in Hadley v. Junior College District, 397 U.S. 50, 56 (1970), bears directly on this problem:

> "It is of course possible that there might be some case in which a State elects certain functionaries whose duties . . . *so disproportionately affect different groups* that a popular election . . . might not be required." (Emphasis supplied).

Chief Justice Warren's dialogue in *Reynolds v. Sims*, 377 U.S. 533, 562-63 (1964), emphasizing by way of parody that "[l]egislators represent people, not trees or acres," and that overrepresentation and underrepresentation are the products of a failure to assure that equal numbers of constituents select equal numbers of representatives. It should be too plain to admit of serious doubt that a population index imposed as the sole criterion on Democratic Party delegate selections would lead, on the one hand, to overrepresentation of Democrats residing in states in which the voters are of a heavily Republican persuasion. Likewise it would lead, on the other hand, to underrepresentation of Democrats in the predominantly Democratic states. Such results are the *inescapable consequence of* using state population statistics as the sole basis for allocating Convention seats among the state parties.[18]

In light of this fatal flaw in appellants' attack, and because of the disproportionate emphasis it has placed on issues other than whether the parties' apportionment schemes are fair and rational, we deem this case an inappropriate vehicle for further scrutiny of those formulas. Other suits presently pending[19] or yet to be brought may provide the occasion for resolving these matters we find unnecessary to our decision in this case. We do not now anticipate the results properly to be reached on such

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[18]*See* Goldstein, *One Man, One Vote and the Political Convention*, 40 U. CIN. L. REV. 1, 29-30 (1971). Insofar as dictum in Maxey v. Washington State Democratic Comm., *supra* note 7, intimates that "total population" alone could be consistent with a requirement of equal representation to a state party convention in a two-party state, we disagree.

[19]*See* text at pages 4, 5, 6 *supra*. [Pages 6, 7, 8 herein]

occasions, since we deal here only with the precise claim advanced by appellants. By the same token, we do not now assert that population may never be an appropriate factor in party convention delegate-allocation. We hold only that, in addition to our conclusions as to state action and justiciability; population alone cannot be the touchstone of the one man, one vote rule as that rule is sought to be applied in the case before us.

The judgment of the District Court is

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 71-1018

THE STATE OF GEORGIA, ET AL., APPELLANTS

v.

THE NATIONAL DEMOCRATIC PARTY, ET AL.

SEPTEMBER TERM, 1970
CIVIL 882-70.

Appeal from the United States District Court for the District of Columbia.

Before: McGOWAN, TAMM and ROBB, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof it is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court:

/s/ NATHAN J. PAULSON

NATHAN J. PAULSON
Clerk

Dated: July 23, 1971.
Opinion per curiam.

1968 DEMOCRATIC PARTY APPORTIONMENT FORMULA

Resolved That the distribution of votes, delegates and alternates from the various States and territories to the Democratic National Convention to be held in Chicago on the twenty-sixth day of August, 1968, be as follows:

(1) Each State shall have three (3) Convention votes for each of the Electors from that State in the Electoral College.

(2) Each State shall have a popular vote bonus equal to one Convention vote for each 100,000 popular votes, or major fraction thereof, cast in that State in 1964 for Electors who either voted for the nominees of the 1964 Democratic National Convention or who were not elected but ran on the ticket of voting for said nominees: *Provided*, That (i) there shall be a minimum of one such bonus vote for each State.

(3) There shall be a victory bonus of ten (10) Convention votes for each State which cast its Electoral

votes for the nominees of the 1964 Democratic National Convention.

(4) Each member of the Democratic National Committee elected by the 1964 Democratic National Convention or subsequent thereto by the Democratic National Committee shall have one Convention vote, said vote to be personal and to be incapable of exercise by any alternate.

(5) Canal Zone, Guam, Puerto Rico and the Virgin Islands shall have twenty-three (23) Convention votes, inclusive of the votes of members of the Democratic National Committee, distributed as follows:

Canal Zone	5
Guam	5
Puerto Rico	8
Virgin Islands	5

1968 REPUBLICAN PARTY APPORTIONMENT FORMULA

RULE NO. 30

The membership of the next National Convention shall consist of: —

A. Delegates at Large

1. Four Delegates at Large from each State.

2. Two additional Delegates at Large for each Representative at Large in Congress from each State.

3. Nine Delegates at Large for the District of Columbia and three additional Delegates at Large for the District of Columbia if it casts its electoral vote, or a majority thereof, for the Republican Nominee for President in the last preceding Presidential election.

4. Six additional Delegates at Large from each State casting its electoral vote, or a majority thereof, for the Republican Nominee for President in the last preceding Presidential election. If any State does not cast its electoral vote, or a majority thereof, for the Republican Nominee in the last preceding Presidential election, but at that election or at a subsequent election held prior to the next Republican National Convention elects a Republican United States Senator or a Republican Governor then in such event such State shall be entitled to such additional Delegates at Large.

5. Five Delegates at Large for Puerto Rico and three Delegates at Large for the Virgin Islands.

B. District Delegates

1. One District Delegate from each Congressional District casting two thousand (2,000) votes or more for the Republican Nominee for President or for any elector pledged to vote for the Republican Nominee for President in the last preceding Presidential election, or for the Republican Nominee for Congress in the last preceding Congressional election.

2. One additional District Delegate for each Congressional District casting ten thousand (10,000) votes or more for the Republican Nominee for President or for any elector pledged to vote for the Republican Nominee for President in the last preceding Presidential election, or for the Republican Nominee for Congress in the last preceding Congressional election.

1972 DEMOCRATIC PARTY APPORTIONMENT FORMULA

BE IT RESOLVED by the Democratic National Committee that the distribution of votes, delegates and alter-

nates to the 1972 Democratic National Convention shall be in accordance with the following:

(1) The total number of Convention votes for the delegates to the Convention shall be 3016 as set forth in the compilation included in this resolution and determined as provided in paragraphs (2), (3) and (5) hereof.

(2) Each State and the District of Columbia shall receive three Convention votes for each of the Electors from that State or the District of Columbia in the Electoral College.

(3) Each State and the District of Columbia shall receive such additional Convention votes as are determined by distributing 1386 Convention votes among the States and the District of Columbia based upon the relationship between (i) in the case of each State other than Alabama, one-third of the number of votes cast in such State in favor of the Presidential and Vice Presidential nominees of the Democratic Party in the 1960, 1964 and 1968 elections and, in the case of Alabama, one-half of the number of such votes cast in the 1960 and 1968 elections, and, in the case of the District of Columbia, one-half of the number of such votes cast in the 1964 and 1968 elections and (ii) one-third of the total number of votes cast in all States other than Alabama in favor of the Presidential and Vice Presidential nominees of the Democratic Party in the 1960, 1964 and 1968 elections plus one and one-half times the total number of such votes cast in Alabama in the 1960 and 1968 elections and in the District of Columbia in the 1964 and 1968 elections.

(4) Each State or the District of Columbia that re-

ceives less than 20 Convention votes pursuant to paragraphs (2) and (3) hereof may select 20 voting delegates to the Convention to cast the total Convention votes received by the State pursuant to paragraphs (2) and (3) hereof.

(5) Canal Zone, Guam, Puerto Rico and Virgin Islands shall have 16 Convention votes, distributed as follows:

Canal Zone	3
Guam	3
Puerto Rico	7
Virgin Islands	3

Canal Zone, Guam and Virgin Islands each may select 6 voting delegates, and Puerto Rico may select 14 voting delegates, to cast the total Convention votes received by each pursuant to this paragraph (5).

(6) Each State, the District of Columbia, Canal Zone, Guam, Puerto Rico and Virgin Islands, in accordance with procedures consistent with the "full, meaningful and timely opportunity" mandate of the 1968 Democratic National Convention, shall select during the calendar year 1972 a nominee to serve as national committeeman and a nominee to serve as national committeewoman beginning upon their confirmation by the 1972 Democratic National Convention, which nominees shall serve as voting delegates to the 1972 Democratic National Convention and whose votes or fractions thereof shall be counted as a part of the total number of Convention votes received pursuant to paragraphs (2), (3) and (5) hereof by such State, the District of Columbia, Canal Zone, Guam, Puerto Rico or Virgin Islands.

(7) Each State, the District of Columbia, Canal

Zone, Guam, Puerto Rico, and Virgin Islands may select a number of alternates equivalent to the sum of (i) one alternate for each of the first 20 Convention votes received by it pursuant to paragraphs (2), (3) and (5) hereof, (ii) one alternate for each two Convention votes in excess of 20 but less than 101 Convention votes received by it pursuant to paragraphs (2), (3) and (5) hereof, and (iii) one alternate for each three Convention votes in excess of 100 Convention votes received by it pursuant to paragraphs (2), (3) and (5) hereof.

(8) Any person serving as national committeeman or national committeewoman of the Democratic National Committee as of the time the Convention convenes in 1972, who is not otherwise serving as a voting delegate to the Convention, shall be entitled to serve as a delegate to the Convention, with full rights and privileges of a delegate on matters coming before the Convention.

1972 REPUBLICAN PARTY APPORTIONMENT FORMULA

RULE NO. 30

The membership of the next National Convention shall consist of:

A. DELEGATES AT LARGE

1. Four (4) Delegates at Large from each of the fifty (50) States.

2. Two (2) additional Delegates at Large for each Representative at Large in Congress from each State.

3. Nine (9) Delegates at Large for the District of Columbia and three (3) additional Delegates at Large

for the District of Columbia if it casts its electoral vote, or a majority thereof, for the Republican Nominee for President in the last preceding Presidential election.

4. Six (6) additional Delegates at Large from each State casting its electoral vote, or a majority thereof, for the Republican nominee for President in the last preceding Presidential election. If any State does not cast its electoral vote or a majority thereof for the Republican nominee in the last preceding Presidential election, but at that election or at a subsequent election held prior to the next Republican National Convention elects a Republican United States Senator or a Republican Governor or a Republican majority of the State's membership in the United States House of Representatives then in such event such State shall be entitled to such additional Delegates at Large.

5. Five (5) Delegates at Large for Puerto Rico, and three (3) Delegates at Large for the Virgin Islands, and three (3) Delegates at Large for Guam.

B. DISTRICT DELEGATES

1. One (1) District Delegate from each Congressional District casting four thousand (4,000) votes or more for the Republican nominee for President or for any elector pledged to vote for the Republican nominee for President in the last preceding Presidential election, or for the Republican nominee for Congress in the last preceding Congressional election.

2. One (1) additional District Delegate for each Congressional District casting twelve thousand five hundred (12,500) votes or more for the Republican nom-

inee for President or for any elector pledged to vote for the Republican nominee for President in the last preceding Presidential election, or for the Republican nominee for Congress in the last preceding Congressional election.

C. ALTERNATE DELEGATES

One (1) Alternate Delegate to each Delegate to the National Convention.

CERTIFICATE OF SERVICE

I, Harold N. Hill, Jr., Executive Assistant Attorney General of the State of Georgia, attorney for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the_____ day of_____, 1971, I served the within and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit upon the Respondents, by mailing true copies thereof in duly addressed envelopes with first class postage prepaid to their counsel of record, as follows:

Joseph A. Califano, Jr., Esquire, Williams, Connolly & Califano, 839 17th Street, N.W., Washington, D. C. 20006, attorney for the National Democratic Party, the Democratic National Committee, Channing E. Phillips and Miss Flaxie Pinkett;

Fred C. Scribner, Jr., Esquire, Pierce, Atwood, Scribner, Allen & McKusick, 465 Congress Street, Portland, Maine 04111, attorney for the National Republican Party, the Republican National Committee, and Mrs. J. Willard Marriott;

Shipley, Akerman, Pickett, Stein & Kaps, 1108 National Press Building, Washington, D. C. 20004, attorneys for Carl L. Shipley, Esquire.

I further certify that all parties required to be served have been served, with the required number of copies.

HAROLD N. HILL, JR.
Executive Assistant
Attorney General
Of Counsel for Petitioners

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-272

STATE OF GEORGIA, ET AL., *Petitioners,*

v.

NATIONAL DEMOCRATIC PARTY, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF DEMOCRATIC PARTY RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CITATIONS

CASE:

Bode v. *National Democratic Party*, No. 71-1536, D.C. Cir. 9

UNITED STATES CONSTITUTION:

Amendment XIV, § 1 2

MISCELLANEOUS:

P. David, R. Goldman & R. Bain, *The Politics of National Party Conventions* (1960) 4, 8

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BRIEF OF DEMOCRATIC PARTY RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the District Court and the Court of Appeals, neither of which is yet reported, are printed in the appendix to the petition.

JURISDICTION

The petition for a writ of certiorari was timely filed on August 23, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1964).

QUESTION PRESENTED

Whether population is the sole permissible constitutional criterion for the allocation of delegates among the states and the District of Columbia at national political party presidential nominating conventions.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The complaint in this case was filed on March 25, 1970. On November 24, 1970 the United States District Court for the District of Columbia entered an order dismissing the complaint. On July 23, 1971 the United States Court of Appeals for the District of Columbia Circuit affirmed that judgment.

STATEMENT OF FACTS

The state of Georgia and several of her citizens, led by then Governor Lester Maddox, sued the National Democratic Party and the National Republican

Party,[1] seeking an order requiring that delegates to both national party presidential nominating conventions in 1972 be allocated among the states exclusively on the basis of population. The District Court held that the complaint did not present a justiciable issue because "there are no judicially discoverable and manageable standards by which to frame appropriate relief." (App. 63)[2] The court also concluded that delegate allocation formulas employed in the past by the national political parties had furthered "their legitimate purposes and [were] neither arbitrary, capricious or violative of any right guaranteed under the Fourteenth Amendment." (App. 62)

The Court of Appeals held that the issue presented by this lawsuit was justiciable,[3] but declined to impose petitioners' strict population delegate allocation formula on the national political parties. It held that there had been no showing either that the delegate allocation formulas adopted by the Democratic and Repub-

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[1] The complaint also named several officials of both parties as defendants. This brief is filed on behalf of the National Democratic Party, the Democratic National Committee, Flaxie M. Pinkett and Channing E. Phillips. Miss Pinkett and Mr. Phillips are the Democratic National Committeewoman and Committeeman from the District of Columbia.

[2] Citations to "(App.)" are to the Appendix in the Court of Appeals. Citations to "(Pet. App.)" are to the Appendix to the petition for a writ of certiorari.

[3] The court also held that the allocation of delegates among the states at a national presidential nominating convention of either of the two major political parties involved "state action" for the purpose of applying equal protection standards. (Pet. App. 7a-12a) The Democratic respondents do not concede the correctness of the decision below on either the question of justiciability or state action. However, neither of those issues is raised by the present petition.

lican parties were irrational under the traditional equal protection test (Pet. App. 18a), or that the petitioners' proposed formula was required by the concept of equal representation at party conventions. Indeed, it found that

> the imposition of a population-based criterion would constitute a departure from the *equal representation* standard underlying the reapportionment cases. While population may be an appropriate measuring rod when public officials are to be elected and held responsible to the entire citizenry, population alone is an inappropriate test of representation in the framework of national politics where parties compete for membership. Although both major parties are constantly striving to garner a greater share of the voting population's support, neither has yet been so successful as to permit it to claim representation of the entire population. The constituency of each party is significantly smaller than the whole of the eligible electorate, and varies dramatically from state to state and from election to election.

(Pet. App. 16a-17a) (footnotes omitted).

Neither major party has ever apportioned its convention on a strict population basis. Historically the principal basis for allocating delegates among the states in both parties has been the electoral college strength of the respective states.[4] Over the years both parties developed the practice of including "victory bonus votes" for states which had supported the party's candidates in recent general elections, both as a means of providing organizational incentive and as a rough

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[4] See P. David, R. Goldman & R. Bain, The Politics of National Party Conventions 164 (1960).

indicator of the traditional sources of party strength. Both major party conventions in 1968 were apportioned on the basis of formulas predicated on a combination of electoral college strength and recent voting performance. (See Pet. App. 20a-22a)

At the time this suit was filed and decided by the District Court no delegate allocation formula for the 1972 Democratic National Convention had been adopted.[5] The 1968 Democratic National Convention appointed a commission, the Rules Commission of the Democratic National Committee, to study, among other things, the problem of delegate allocation and to recommend a new formula to the Democratic National Committee. That commission reported to the Democratic National Committee in February 1971, and on February 19, 1971 the full Committee, following an entire day of discussion and debate, adopted a formula allocating 3,016 delegates among the states, the District of Columbia, Puerto Rico and the territories as follows:

> —3,000 delegates are divided among the states and the District of Columbia, roughly one-half on the basis of electoral college strength and roughly one-half on the basis of the average number of votes for the Democratic presidential candidate in the last three presidential elections; each state receives three delegate votes for each electoral vote it will possess in 1972, for a total of 1,614 delegate votes, and the remaining 1,386 delegate votes are apportioned on the basis of past voting performance.

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[5] The 1968 Republican National Convention adopted an allocation formula governing the 1972 convention. It is almost identical to the formula under which delegates were allocated for the 1968 Republican Convention. (Compare Pet. App. 21a-22a with *id.* 25a-27a)

—16 delegate votes are allocated to the Commonwealth of Puerto Rico and the territories of the Canal Zone, Guam and the Virgin Islands, with Puerto Rico receiving seven votes and each of the territories receiving three votes.

The record in the Court of Appeals was supplemented to include the newly adopted Democratic formula, but the court did not rule on its validity in view of the narrow question presented by this case—whether the Constitution compels the adoption of a strict population formula for allocating delegates. (Pet. App. 18a-19a)

REASONS TO DENY THE WRIT

The decision below is plainly correct, and there is no occasion for further review by this Court.

Petitioners seek to invoke the legislative reapportionment decisions of this Court to impose upon national party nominating conventions their population apportionment standard as the only constitutionally permissible means of allocating delegates among the states. As the Court below noted, however, the analogy to the legislative reapportionment decisions breaks down at two points critical to the applicability of those decisions to this case.

The function of a national presidential nominating convention is to choose nominees for President and Vice President to represent the party in the general election, and to organize the campaign to support those nominees. The structuring of a convention to perform these functions may involve numerous considerations other than the strict notion of equal representation of a constituency. For example, presidential campaigns are largely conducted on a state-by-state basis

in light of the constitutionally mandated electoral college method of choosing a President. Party morale and organization in each state is thus vital to the election campaign. If the notion of constituent representation results in delegate allocation formulas which ignore the constitutional reality of the electoral college and the healthy political reality of party morale in the individual states, the convention may be crippled in its attempt to choose an electable nominee and begin his campaign for the presidency.

Second, and more important, the analogy to the legislative reapportionment cases breaks down because, even if we assume that a national political convention is a representative body in the same sense in which a legislature is, strict population as a standard for apportionment does not result in equal representation for the party's presumed constituency. It can be demonstrated historically that an apportionment formula which takes no account of the uneven distribution of party strength throughout the nation produces gross distortions in the makeup of a convention and may lead to disastrous results at the polls for the party's nominee.

The clearest example is provided by the election of 1912. President William Howard Taft sought renomination on the Republican ticket that year and came to the convention with the solid support of the delegations from the southern states. The convention was apportioned on the basis of the states' electoral college strength without regard to the traditional sources of Republican party support.

President Taft's control of the southern delegations allowed him to defeat the nomination bid of former

President Theodore Roosevelt. However, strong pro-Roosevelt sentiment in other sections of the country led to the formation of the Bull Moose Party and a separate Roosevelt candidacy.

The southern delegate strength which had held the nomination for Taft could not be translated into popular or electoral votes because of the state of virtual desuetude into which the Republican Party had fallen in the South following the end of Reconstruction. The result was an easy victory for the Democratic nominee, Woodrow Wilson, and smashing defeat for President Taft, who finished third in the popular vote. See generally P. David, R. Goldman & R. Bain, The Politics of National Party Conventions 166-67.

The lesson gleaned by the Republicans from the debacle of 1912 was that delegate allocation formulas simply must take account of the uneven distribution of party strength to avoid losing all touch with the reality of the electoral process. In 1916 the Republicans began granting "victory bonus votes" to states which cast their votes for the Republican nominee, in an effort to identify and reward traditional party strongholds. The Democrats followed suit in the 1940's, and every convention of either party since that time has recognized traditional sources of party strength in its apportionment formula.

To insist at this late date, as petitioners do, that population is the only factor which the Constitution permits major national political parties to take into account in apportioning their conventions, is to ignore the lessons of history and to invite a repetition of the Bull Moose episode. As the Bull Moose episode clearly demonstrates, it is simply inaccurate to say, as peti-

tioners repeatedly do, that citizens in certain states are either "underrepresented" or "overrepresented" at a party convention because the convention is not apportioned on the basis of population. However difficult it may be to identify a party's constituency, it is plain that neither the Democratic Party nor the Republican Party can claim all the citizens of any state as adherents.

The question of what constraints, if any, the equal protection clause may place upon the allocation of delegates at national party nominating conventions poses difficult problems. In the absence of invidious discrimination, we submit, there is a broad range of factors which a party may legitimately and rationally take into account under traditional equal protection standards in distributing power within its councils. This case, however, is not an appropriate vehicle for examining the relationship between equal protection and the national party convention.[6] For the sole question presented is whether population is the only permissible criterion under the Constitution. And the

[6] There is presently pending in the United States Court of Appeals for the District of Columbia Circuit a case which raises related issues regarding the allocation of delegates of national party nominating conventions. *Bode* v. *National Democratic Party*, No. 71-1536, D.C. Cir. In *Bode* a group of dissident Democrats sued the Democratic Party following the adoption of the allocation formula for 1972, claiming that the only permissible allocation formula under the equal protection clause is one based exclusively on past voting performance. The District Court in the *Bode* case found the question presented to be justiciable, held that the Democratic National Committee's 1972 formula did not meet equal protection standards, and concluded that past voting performance was the sole acceptable criterion. The case was argued and submitted to the Court of Appeals on August 25, 1971. No decision has yet been rendered.

lessons of logic and history are clear on that score. The Constitution cannot be read to impose upon political parties an apportionment system which bears no relationship whatever to the function of a presidential nominating convention or to the realities of the electoral process.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: September 22, 1971

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

No. 71-272

STATE OF GEORGIA, ET AL., *Petitioners,*

v.

THE NATIONAL DEMOCRATIC PARTY,
THE NATIONAL REPUBLICAN PARTY,
ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE REPUBLICAN NATIONAL COMMITTEE AND MRS. J. WILLARD MARRIOTT IN OPPOSITION

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OPINIONS BELOW AND JURISDICTION

The opinion below and the basis of this Court's jurisdiction are adequately described in the Petition (p 2.).

QUESTION PRESENTED

Must the 1972 Republican and the 1972 Democratic Conventions be reapportioned so that delegates will be allocated among the various states on a strict population basis.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are adequately set forth in the Petition (pp. 3-4).

STATEMENT OF THE CASE

This is an action brought by the Petitioners, the State of Georgia, its Secretary of State, the State Election Board, and individual Georgia residents claiming to represent all registered voters of the State of Georgia, seeking to compel the reapportionment of the 1972 Democratic National Convention and the 1972 Republican National Convention. The Petitioners seek to require that delegates to these conventions be apportioned among the various states, the District of Columbia, the Commonwealth of Puerto Rico and the Territories on the basis of total population. Petitioners urge that this action is required by the Fourteenth Amendment of the United States Constitution.

The apportionment formula for delegates to the 1972 Republican National Convention adopted by the 1968 Republican National Convention and the rules adopted by that Convention relative to the selection of the 1972 delegates are reproduced in the Appendix (App. p. 1). The delegates so chosen are each entitled to one vote at the 1972 Republican National Convention.

The Petitioners have not attempted to show, and there is nothing in the record to indicate that the Re-

publican delegate allocation formula results in the delegates having unequal constituencies, if a standard other than total population is used. The Court below stated that even assuming there is a requirement of equal representation, equal representation would not result from an allocation of delegates on a strict population basis. Petitioners have shown only that the convention delegates are not allocated to each State on the basis of that state's population. They have not suggested any other basis for allocation, and have not shown that the allocation formula used causes a deviation from any standard that could be considered proper.

REASONS FOR DENYING THE WRIT

The question decided by the Court below is not of a character warranting review by this Court. Petitioners' arguments in support of the single and limited claim they present are essentially the same as those advanced in the Court below, namely, that the delegate allocation formulas do not result in each delegate to the national convention representing an equal segment of the national population. The decision of the Court of Appeals that this is not required is clearly correct.

I.

Total population is not an appropriate basis for allocating delegates among the various states.

The Court of Appeals held only that population alone is not "the touchstone of the one man, one vote rule" as the Petitioners seek to apply such rule in this case. The Court below correctly stated that a delegate to a national political convention does not and is not intended to represent the entire population of his state. One of the principal functions of a delegate to a na-

tional political convention is to nominate that party's candidate for President. It cannot seriously be contended that in choosing this candidate the Republican National Convention or its delegates should be or will be sensitive to the wishes of all persons in every state on an equal basis. Quite clearly, responsible representation by the delegates to the convention, in choosing a candidate, may require a delegate to vote for a candidate whose views are diametrically opposed to those of a great many persons from the particular state he represents. A claim that these people should be equally represented at the convention misses entirely the purpose and function of a national political convention.

As this Court has stated, "The Equal Protection Clause does not, of course, require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious." *Avery* v. *Midland County,* 390 U.S. 474, 484 (1968). There is nothing arbitrary or invidious in a political delegate allocation formula which distinguishes between citizens on the basis of their political persuasions.

It is difficult, or perhaps impossible, to specify accurately who the delegates to the national convention really represent. They might be said to represent the Republicans within any particular state who did, or were entitled to, participate in the initial delegate selection process. Typically, this would be the enrolled Republicans within the State, at least in those states which have party enrollments. On the other hand it can equally well be argued that the delegates to the Republican National Convention represent only those Republicans who actively participate in party affairs and resolutely support the party's candidate and its philosophy. At the other extreme, it could be said that

the delegates do not represent people from any particular state, but rather have a national constituency as will the candidate they choose in the event he is elected.

The only point which can be made with certainty is that the delegates do not, and are not intended to, equally represent all of the people.

Any system of allocation of political delegates on the basis of total population would give "the same number of representatives to unequal numbers of constituents", and would offend the standards of equal protection. *Reynolds* v. *Sims*, 377 U.S. 533, 563 (1964). If each state were to have at a Republican National Convention, a number of delegates based on the state's population, the states with low Republican population would be over-represented and the states with a high Republican population would be under-represented.

II.

The Court below was clearly correct in not granting declaratory and injunctive relief.

Petitioners urge that once the court found a justiciable question, it should not deny relief simply because the Petitioners sought reapportionment of delegates on a clearly inappropriate population basis.

Petitioners presented evidence showing that if population and only population were the proper standard for allocation, then Respondent's formula results in a malapportionment. However, the court found that total population was not the proper basis. Petitioners have not claimed or demonstrated any malapportionment to exist on the basis of any other test which the court might find proper.

There being no showing that the Respondents' allocation formulas cause a deviation from any proper standard, there is no reason for the court to grant relief. There is nothing in the Record showing any relief is required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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E. VICTOR WILLETTS, JR.,
Counsel for Respondents Republican National Committee and Mrs. Marriott

September, 1971

Rules Adopted by Republican National Convention Held at Miami Beach, Florida, August 5, 1968

MEMBERSHIP IN THE NEXT NATIONAL CONVENTION

Rule No. 30

The membership of the next National Convention shall consist of:

A. Delegates at Large

1. Four (4) Delegates at Large from each of the fifty (50) States.

2. Two (2) additional Delegates at Large for each Representative at Large in Congress from each State.

3. Nine (9) Delegates at Large for the District of Columbia and three (3) additional Delegates at Large for the District of Columbia if it casts its electoral vote, or a majority thereof, for the Republican Nominee for President in the last preceding Presidential election.

4. Six (6) additional Delegates at Large from each State casting its electoral vote, or a majority thereof, for the Republican nominee for President in the last preceding Presidential election. If any State does not cast its electoral vote or a majority thereof for the Republican nominee in the last preceding Presidential election, but at that election or at a subsequent election held prior to the next Republican National Convention elects a Republican United States Senator or a Republican Governor or a Republican majority of the State's membership in the United States House of Representatives then in such event such State shall be entitled to such additional Delegates at Large.

5. Five (5) Delegates at Large for Puerto Rico, and three (3) Delegates at Large for the Virgin Islands, and three (3) Delegates at Large for Guam.

B. District Delegates

1. One (1) District Delegate from each Congressional District casting four thousand (4,000) votes or more for the Republican nominee for President or for any elector pledged to vote for the Republican nominee for President in the last preceding Presidential election, or for the Republican nominee for Congress in the last preceding Congressional election.

2. One (1) additional District Delegate for each Congressional District casting twelve thousand five hundred (12,500) votes or more for the Republican nominee for President or for any elector pledged to vote for the Republican nominee for President in the last preceding Presidential election, or for the Republican nominee for Congress in the last preceding Congressional election.

C. Alternate Delegates

One (1) Alternate Delegate to each Delegate to the National Convention.

ELECTION OF DELEGATES TO NATIONAL CONVENTION

Rule No. 31

Delegates at Large to the National Convention and their Alternates and Delegates from Congressional Districts to the National Convention and their Alternates shall be elected in the following manner:

(a) By primary election in accordance with the applicable laws of such States as required by law, the election of Delegates to National Conventions of political parties by direct primary and in the District of Columbia in accordance with its law; provided, that in any of these in which Republican representation upon the Board of Judges or Inspectors of Elections for such primary election is de-

nied by law, Delegates and Alternates shall be elected as hereinafter provided.

(b) By Congressional District or State Conventions, as the case may be, to be called by the Congressional District or State Committees, respectively. Notice of the Call for any such Convention shall be published in a newspaper or newspapers of general circulation in the Congressional District or State, as the case may be, not less than fifteen (15) days prior to the date of said Convention; provided, however, that in selecting Delegates and Alternates to the National Convention, no State law shall be observed which hinders, abridges, or denies to any citizen of the United States, eligible under the Constitution of the United States, to the office of President or Vice President, the right or privilege of being a candidate under such State law for the nomination for the President or Vice President; or which authorizes the election of a number of Delegates or Alternates from any State to the National Convention different from that fixed in these Rules.

(c) By the Republican State Committee or Governing Committee in any State in which the law of such State specifically authorizes the election of Delegates or Alternates in such manner.

(d) In a Congressional District where there is no Republican Congressional Committee, the Republican State Committee shall issue the Call and make said publication.

(e) All Delegates from any State may be chosen from the State at Large, in the event that the laws of the State in which the election occurs, so provide.

(f) Alternate Delegates shall be elected to said National Convention for each unit of representation equal in number to the number of Delegates elected therein and shall be chosen in the same manner and at the same time the Delegates are chosen; provided, however, that if the law of any State shall prescribe the method of choosing Alternates they shall be chosen in accordance with the provisions of the law of the State in which the election occurs.

(g) The election of Delegates and Alternates from the District of Columbia, Puerto Rico, the Virgin Islands and Guam shall be held under the direction of the respective recognized Republican Governing Committee therein in conformity with the Rules of the Republican National Committee or the laws of the District of Columbia, Puerto Rico, the Virgin Islands and Guam.

(h) Election of Delegates shall be certified in every case where they are elected by Conventions, by the Chairman and Secretary of such Conventions respectively and in case of election by primary, they shall be certified by the proper official, and all certificates shall be forwarded by said duly elected Delegates and Alternates in the manner herein provided.

(i) All Delegates or Alternates shall be elected not later than thirty-five (35) days before the date of the meeting of said National Convention, unless otherwise provided by the laws of the State in which the election occurs.

(j) Delegates and Alternates at Large to the National Convention shall be duly qualified voters of their respective States.

(k) Delegates and Alternates to the National Convention, representing Congressional Districts, shall be residents and qualified voters in said districts respectively.

ELECTION OF DELEGATES TO DISTRICT AND STATE CONVENTIONS

Delegates to Congressional District and State Conventions shall be elected under the following rules:

(l) Only legal and qualified voters shall participate in a Republican primary, caucus, mass meeting, or mass convention held for the purpose of selecting Delegates to a County, District, or State Convention, and only such legal and qualified voters shall be elected as Delegates to County, District and State Conventions; provided, however, that

in addition to the qualifications provided herein the governing Republican Committee of each State, shall have the authority to prescribe additional qualifications not inconsistent with law. Such additional qualifications shall be adopted and published in at least one daily newspaper having a general circulation throughout the State, such publication to be at least ninety (90) days before such qualifications shall become effective.

(m) No Delegates shall be deemed eligible to participate in any convention to elect Delegates to the said National Convention, who were elected prior to the date of the issuance of the Call for such National Convention.

(n) District Conventions shall be composed of Delegates who are legal and qualified voters therein, and Delegates to State Conventions shall be qualified voters of the respective districts which they represent in said State Conventions. Such Delegates shall be apportioned among the counties, parishes, and cities of the State or District having regard to the Republican vote therein.

Rule No. 32

Participation in a Republican primary, caucus, any meeting or convention held for the purpose of selecting Delegates to a County, District, State or National Convention shall in no way be abridged for reasons of race, religion, color or national origin. The Republican State Committee or governing committee of each State shall take positive action to achieve the broadest possible participation in party affairs.

Rule No. 33

No State shall elect a greater number of persons to act as Delegates and Alternates than the actual number of Delegates and Alternates respectively to which they are entitled under the Call, and no unit of representation may elect any Delegate or Delegates, or their Alternates, with permission to cast a fractional vote.